CAN NOT COUNT 'EM

Stray Votes From Plainfield and Paris Are Debarred.

AND MAY NOT BE CONSIDERED

In the Congressional Recount—Mr. Fitz Gerald's Opinion and Yesterday's Discussions—News of Recount.

John C. Fitz Gerald's opinion, submitted to the recount committee yesterday, was to the effect that the stray votes from Plainfield and Paris should not be recounted by the committee. The committee was late in coming to order. In front of Chairman Benjamin lay a large sealed envelope containing the opinion submitted by Mr. Fitz Gerald by order of the chairman. The latter stated the situation to be that Mr. Launiere had moved for the counting of the eight questionable votes from Plainfield, and that, pending the decision as to said votes and the two stray votes from Paris, he had requested Mr. Fitz Gerald's opinion, which was then read, as follows:

Mr. Fitz Gerald's Opinion.

John Benjamin, Chairman of Committee appointed by Board of County Canvassers:

You ask my opinions upon the following questions:

"Has your committee any right to count and canvass ballots which are not found by them in the ballot boxes when such boxes are not brought before the committee?"

You also state that in the township of Plainfield the ballots in the box are eight short of the poll list and of the number of votes cast as set forth in the official return; and that the count by your committee shows eight votes less for Mr. Richardson than the return and tally sheet in the box showed; and that the tally sheet in the box showed that eight straight people's party votes had been cast and counted for Mr. Richardson, and that upon examination of the ballots in the box these eight tickets could not be found. That two of the election board of the township, after your committee had counted the ballots in the box and the shortage was discovered, appeared before your committee and produced eight people's party ballots with Mr. Richardson's name thereon for the office of congressman, and made affidavit that such ballots were found, by the township canvassing board, when they canvassed the ballots cast at such election, in the ballot box among the other ballots cast and were counted by such board; the affidavit further stating that when the township canvassing board completed the canvass and returned the ballots to the box and locked and sealed such box these eight ballots were by mistake and oversight on the part of such board overlooked and not returned to the box.

You then ask: "Shall these eight votes be counted or shall Mr. Richardson be credited with eight more than the ballots actually found in the box showed?"

You also state,

"In the township of Paris the ballots in the box are two short of the poll list. Affidavits have been filed showing that the ballots were voted, but were mislaid by the inspectors during their count, and were not returned to the box, and that such ballots are now produced and identified by such affidavits."

And you ask:

"Shall these two votes be counted by the committee?"

The substance of your inquiries, if I understand them correctly, is:

"Have your committee any right, in making this recount of the ballots, to count any ballots other than such as are actually found by them in the ballot boxes?"

Authority of the Statute.

The only authority which you have is such as is expressly given you by statute. The statute, after providing the manner of your appointment, then prescribes, in the following language, what the committee shall do. "Said committee shall, in some public place, where such candidates and their counsel may be present * * * without unnecessary delay, proceed to open the ballot boxes * * and to make a recount thereof as to such candidates, and make correct and full returns in writing under their hands to said board, showing the whole number of votes given, the names of the candidates and the number of votes given to each written out in words and figures as upon the ballots. Said committee, upon making such recount, shall at once return the ballots to their respective boxes, carefully fasten and seal the same and deliver them to the officer having the care and custody thereof." Laws 1887, page 343.

Under this statute your duties as a committee are ministerial only and not in any sense judicial. You have no power to compel the attendance of witnesses before you nor to send for persons or papers. You are not authorised to take or weigh evidence.

You have no right to investigate whether any of the ballots which you find in the boxes have been unlawfully cast or not, nor whether there are ballots not now in the boxes which should be placed therein.

Neither have you any right to investigate the question of fact whether these eight ballots from Plainfield and the two from Paris were or were not actually voted, found in the boxes by the election board, canvassed by them, and then by an oversight on the part of the board, not returned to the boxes. Such questions of fact are exclusively for the courts, in proper proceedings, and are not matters which your committee have any authority to hear or determine.

The supreme court of Massachusetts, in the case of Luce vs. Mayhew, 13 Gray, 83, in speaking of the powers of a canvassing board, say:

"They are not made a judicial tribunal nor authorized to decide upon the validity of the election in any other mode than by an examination of the returns made to them according to law. They are not required or authorized to hear witnesses or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns and another is the real truth of the case, they can only act upon the former."

This rule, if one result appears upon the returns and another is the real truth of the case, you can only act upon the former, is affirmed by Justice Gray, now of the United States supreme court, then of the supreme court of Massachusetts, in the case of Clark vs. Board, 126 Mass. 284.

Calling attention again to the language of the statute:

You are "to open the ballot boxes * * * make a recount thereof, * * * make correct and full returns, * * * showing the whole number of votes * * * given * * *," and then "return the ballots to the respective boxes."

Must Not Act Judicially.

You are simply to ascertain the whole number of ballots there are, now, at the time you are making the recount, in the boxes and for whom cast. This number must be the result of a pure inflexible, mathematical calculation. You have no discretion whatever in the matter. When you have done this and made your report, you have performed your whole duty, anything less would not suffice, anything more would be an inexcusable usurpation of authority on your part.

In this connection permit me to call your attention to the decision of our own supreme court giving a construction to act No. 293 of the session laws of 1887. You will recollect this act provides for a recount before a committee in the probate court, of the ballots cast at election. The duty imposed by this act upon such committee as to the recount of the ballot is in substantially the same language as that used in this section under which you are now acting. It is this. "Upon the day and place specified in the order the boxes shall be brought before the board of examiners * * and opened, and the ballots therein shall be counted by said board, * * and said board shall make a statement in writing of the result of said count. * * After the ballots are counted they shall be placed back in the boxes and sealed up by said board."

The court, Justice Champlin speaking for it, says:

"We think it plain that the investigation is confined solely and exclusively to ascertaining the number of ballots which are contained in the ballot boxes for the person whom the canvassers have "declared elected and the opposing candidate. The act does not contemplate that the board of examiners shall take testimony relative to any fraud committed by the board of inspectors or others, but the duties prescribed are purely ministerial and confined as above stated to a recount of the ballots." [Andrews vs. Judge of Probate, 74 Mich., 285.]

Supreme Court Decisions.

This decision but reaffirms the principle announced in an earlier decision made by the same court (Attorney General vs. Canvassers, 64 Mich., 611), where Chief Justice Campbell speaking for the court says:

"The law imposes upon them (the canvassing board) the single and specific duty of canvassing the votes certified by the election officers, and certifying the number of votes cast. * * They are not a judicial nor quasi-judicial body. They are not a permanent body with administrative functions. They are created for a single occasion and for a single object. They have no means given them to inquire, and no right to inquire, beyond the returns of the local boards. They have no right to raise outside issues to decide themselves or to ask us to decide. When they have figured up the returns exactly as handed over to them they have completed their task and exhausted their power."

The same court in 1890 again says:

"The duty of a board of canvassers is purely clerical." [Coll vs. Canvassers, 83 Mich., 370.]

And reaffirms this in April, 1892, in the case of McQuade vs. Ferguson, 51 N. W. R., 1072: "Their duties are purely ministerial and clerical.

In the case of Attorney General vs. Barstow, 4 Wisconsin, 749, the supreme court of Wisconsin say that the canvassing officers "are to add up and certify by calculation the number of votes given for any office; they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated." In the case of Morgan vs. Quackenbush, 22 Barb., 72, the supreme court of New York held "that it was the duty of the canvassing board to canvass the returns and declare the result, and that this was a purely ministerial act. They are judges of nothing and not allowed to receive evidence of anything outside of the returns themselves."

Are Ministerial Officers.

This proposition, that canvassing boards and returning judges are ministerial officers possessing no discretionary power, has been settled by the supreme court in nearly every state. McCrary on Elections, third edition, page 153, and cases there cited.

Justice Brewer, now of the United States supreme court, then one of the judges of the supreme court of Kansas, in the case of Lewis vs. Commissioners, 16 Kansas, 108, uses this language:

"It is a common error for a canvassing board to overestimate its powers whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election. It is apt to imagine that it is its duty to inquire into these alleged frauds and decide upon the legality of the votes, but this is a mistake. Its duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up and declare the result. * * * The simple purpose and duty of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the court for contesting elections or in quo warranto proceedings."

The statute provides, Laws 1891, page 269, section 37, in respect to the township election board, that "after the ballots are counted they shall, together with one tally sheet, be placed in the ballot box, which shall be securely sealed in such manner that it cannot be opened without breaking such seal. The ballot box shall then be placed in charge of the township or city clerk, but the keys of said ballot box shall be held by the chairman of the board and the election seal in the hands of one of the other inspectors of election."

In this condition I assume the ballot boxes of each of these towns came to your committee.

Has Limited Authority.

The law presumes that the election boards of these towns have done their duty and that all the votes cast at such polls are in the boxes. To overcome this presumption there must be evidence taken and then a judicial determination made as to the fact.

This your committee does not possess the power to do. The supreme court of Missouri, in speaking upon this subject, uses this language: "When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation." State vs. Steers, 44 Mo. 223.

But, it may be said, is the will of the people to be defeated by the oversight or neglect of the election board? Certainly not, but your committee is not the tribunal in which such mistakes may be rectified and redress given. The courts, and in this case the house of representatives as well, possess this power, and they, it must be presumed, upon a proper investigation, will redress the error if one exists.

I am clearly of the opinion that these votes from Plainfied and Paris should not be counted.

December 12, 1892.

Yours respectfully,
JOHN C. FITZ GERALD.

A short silence followed the reading of the opinion, which was naturally broken by the democratic side of the committee. Mr. Launiere said he thought the opinion should be construed to apply to other precincts than the two in question; he claimed the committee had acted judicially in several other instances where the ballots had varied from the poll lists and returns and where they had been marked in various ways not in line with the marks required by the law. Mr. Turner also stated that the committee had acted judicially in determining the meaning of all sorts of marks found on the ballots.

Mr. Taggart said that the substance of the opinion was simply that ballots found outside of the boxes should not be counted and that the board had no judicial authority and that the opinion did not in any sense favor going back into a reconsideration of other ballots already canvassed and which were no longer in question.

Distinguishing Marks.

Mr. Turner—Haven't you, Mr. Benjamin, thrown out lots of ballots because there were distinguishing marks upon them?

Mr. Benjamin—No, not to my knowledge. Only when they were improperly marked by the inspectors.

Mr. Taggart—Any mark put upon a ballot by an elector can not be called a distinguishing mark. The inspector cannot change the will of the voter.

James A. Coye thought it entirely out of place to go back and discuss every ballot cast regarding which there might have been a difference of opinion. Mr. Turner said that he believed the canvassing board would yet do the justice to count the ballots so evidently cast.

Coming to Business.

In order to get some of the questions before the committee Mr. Launiere moved that the action of the committee in tallying a certain vote in the third precinct of the Fifth ward be rescinded. The ballot in question had been marked on the back, "voted but not deposited. Elector unknown."

The chairman declared the motion out of order on the ground that that question was not referred to in the opinion and that it had been canvassed and settled upon before and furthermore that the motion had not been seconded.

Mr. Emmons thereupon seconded the motion and the chair again declared it out of order. Mr. Emmons agreed with Mr. Launiere that the vote should be thrown out. He said he had agreed to count it if it didn't exceed the poll list, and the clerks had made note to that effect on their tally sheets, so he proposed to stand by it.

Mr. Benjamin claimed that Mr. Goss had explained the discrepancy satisfactorily to him and he thought it should have been satisfactory to Mr. Emmons. Mr. Launiere said Mr. Benjamin was going back on the opinion by undertaking to discuss what the marks on the ballots indicated.

Discussing the Opinion.

Mr. Taggart said no lawyer would construe the opinion to mean that the board should not exercise their ordinary intelligence. In this case the words on the back of the ballot themselves showed that they were not placed there by the elector but by the inspector.

Mr. Emmons said the law in this case was not complied with in any event as the elector hadn't given his name, there being nothing to show it.

On the theory of being compelled to count all the votes in the boxes, Mr. Turner claimed it had not been done and he wanted to go back and count each of them. Mr. Coye claimed the questions had all been disposed of, except the ones referred to Mr. Fitz-Gerald.

Mr. Launiere wanted his question put, but Mr. Benjamin refused to put the question notwithstanding Mr. Emmons had seconded it, thus indicating that the decision of the chair as to the point of order would be overruled.

Belknap Loses One.

Mr. Launiere then put the question himself which prevailed by the two votes, and amid considerable hubbub the clerks were ordered to strike out the tally referred to, thus reducing Mr. Belknap's gain of 2 to 1.

Mr. Taggart wanted the matter referred to Mr. FitzGerald to ascertain whether the opinion by him referred to the case in point, and if not what his opinion would be in such a case, but his protest was without effect.

The minutes referred to by Mr. Emmons were found on the tally sheets of both the clerks, and the tally for the vote in question was erased, leaving Mr. Belknap's gain 1 instead of 2.

After a sort of informal recess Mr. Emmons wanted to know if there were any other precincts where the votes exceeded the poll lists. If so he wished similar action to be taken on them. Nobody answered.

Mr. Turner produced an affidavit of C. Sumner Burrows stating that he had challenged 199 votes cast at the Soldiers' home; that said votes were numbered according to the poll lists and marked by pasting a slip of paper on the ballots and stating that the voters of said ballots were not residents or legal voters. No action was taken on the affidavit and Mr. Benjamin ordered the clerks to proceed to compare the tally sheets and notes thereon together with the other committeemen.

At 5 o'clock this work was completed and found O. K. The chairman announced that the committee would stand adjourned until Wednesday at 9 a. m. Mr. Launiere thought there should be a meeting today but yielded to tomorrow. The canvassing board will meet at 2 p. m. tomorrow to receive the committee's report.

The Immediate Prospects.

Mr. Turner and the other democrats profess confidence that the board will "do the square thing" by recounting the Plainfield ballots. They say that Supervisor Hyde, a republican member of the Plainfield board of inspectors is doing his best to induce other republicans to count them; on the other hand it is claimed that the board cannot legally do otherwise than to accept and adopt the committee's report. At any rate the democrats will raise several questions for solution by the board, provided it will consider them.

The results of the recount footed up yesterday give Richardson a plurality of 386 in Kent county as against 387 on the original count, not estimating the votes in question. The totals are:

Belknap	12,315
Richardson	12,701
Clute	1,354
Not counted	921
Total	27,291